STATE OF MICHIGAN

COURT OF APPEALS

RONALD D. MCCUMMINGS,

Plaintiff-Appellee,

v

PIONEER STATE MUTUAL INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
October 4, 2007

No. 269832
Gladwin Circuit Court
LC No. 04-001734-CK

Before: Bandstra, P.J., and Zahra and Owens, JJ.

PER CURIAM.

Defendant appeals as of right the circuit court's decision rejecting defendant's affirmative defense of arson set by the insured and awarding plaintiff insurance proceeds covering losses resulting from a fire at his house on September 23, 2003. We affirm.

I. Hearsay

Defendant first argues the trial court erred when it refused to admit Donald Morrison's statement that plaintiff gave him a van in exchange for Morrison setting fire to plaintiff's house. We review a trial court's decision to admit evidence under a hearsay exception for an abuse of discretion. *People v Geno*, 261 Mich App 624, 631-632; 683 NW2d 687 (2004). A trial court abuses its discretion "when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

Defendant first maintains that the trial court erred when it determined that Morrison's statement was not admissible as a statement by a co-conspirator during the course, and in furtherance, of the conspiracy[1] pursuant to MRE 801(d)(2). We disagree.

[1] Defendant asserted that plaintiff and Morrison conspired to burn down plaintiff's house so that plaintiff could receive the insurance proceeds and that plaintiff compensated Morrison for setting fire to the house by giving him a van.

We agree that defendant presented evidence independent of Morrison's statement of the alleged conspiracy. See *People v Martin*, 271 Mich App 280, 316-317; 721 NW2d 815 (2006). Specifically, defendant presented evidence that plaintiff's house burned down as a result of arson committed by "an amateur," that plaintiff purportedly "sold" a van, which he had purchased for $6,200 approximately 19 or 20 months earlier, to Morrison for $1,000 shortly after the fire and that Morrison had never actually paid plaintiff for that van. In addition, we agree with defendant that Morrison's statement was made during the course of the alleged conspiracy, which continues until the common enterprise has been fully completed, abandoned, or terminated. *Id.* at 317. In this case, the common enterprise would not be fully completed until plaintiff actually recovered the insurance proceeds.

However, we find that Morrison's statement was not made in furtherance of the alleged conspiracy. We acknowledge that the requirement that statements further a conspiracy has been construed broadly. *Id.* "[S]tatements that prompt the listener, who need not be one of the conspirators, to respond in a way that promotes or facilitates the accomplishment of the illegal objective will suffice." *Id.* Here, however, the circumstances surrounding Morrison's alleged admission do not show that he made the statement with the intent to somehow further the alleged conspiracy with plaintiff. Morrison, who was the estranged boyfriend of plaintiff's niece and the father of her child, made the alleged admission to Chad Watton, the estranged ex-boyfriend of plaintiff's stepdaughter and the father of her child, during a phone argument concerning threats by Watton's new girlfriend to plaintiff's stepdaughter, and by plaintiff's stepdaughter to Watton, in which plaintiff's stepdaughter and niece were participants. Under the circumstances, the evidence does not support a finding that Morrison told Watton of his involvement in setting the fire, especially in this setting, for any reason that would tend to facilitate or promote the conspiracy. We thus find that the trial court did not abuse its discretion when it determined that the statement was not admissible under MRE 801(d)(2).

Defendant also argues that the trial court erred when it found that Morrison's statement was not admissible as a statement against interest under MRE 804(b)(3). We agree. MRE 804(b)(3) defines a statement against interest as:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

The trial court held that, as to Morrison at least, his statement to Watton satisfied the requirements of this rule. This finding did not constitute an abuse of discretion. The statement was clearly against Morrison's penal interest. The trial court did not err in finding that a "reasonable person" in Morrison's position would not have made such a statement unless he believed it to be true, despite ample evidence of Morrison's own possible motives to fabricate at the time the statement was made, or any claim that he was acting irrationally.

However, the trial court then found, after reviewing the factors outlined in *People v Poole*, 444 Mich 151; 506 NW2d 505 (1993), that Morrison's statement could not be used against plaintiff. The additional inquiry into the reliability of such statements when the prosecutor seeks to use them against an accomplice rests on a finding that such an inquiry is necessary to protect the accomplice's Sixth Amendment[2] right to confrontation. *Id*. at 163-165. But, unlike criminal defendants, the Confrontation Clause of the Sixth Amendment does not protect civil litigants. *Durant v Stahlin*, 375 Mich 628, 649; 135 NW2d 392 (1965). See also *In re Brock*, 442 Mich 101, 108; 499 NW2d 752 (1993). Thus, the trial court erroneously relied on *Poole* to block Morrison's admissions.

Nevertheless, even if we were to assume that there was no other justification to exclude Morrison's testimony, error in the admission or exclusion of evidence is not ground for a new trial unless failure to take this action would be inconsistent with substantial justice. MCR 2.613(A); MRE 103(a); *Temple v Kelel Distributing Co, Inc*, 183 Mich App 326, 330; 454 NW2d 610 (1990). In the instant case, the trial court's analysis during its decision of whether to exclude the evidence clearly shows that the court found Morrison's statement unreliable as to its truth concerning plaintiff's involvement. This was based on the fact that the statement was made in response to a specific inquiry by Watton, rather than spontaneously, and on the quite complicated ulterior motives and disputes that surrounded the conversation and plaintiff's relationship to Morrison, Watton, and the other parties to the conversation. We cannot say that the trial court clearly erred in finding Morrison's admission to be unreliable evidence of plaintiff's involvement, or in choosing to disbelieve it. "Questions of credibility are left to the trier of fact and will not be resolved anew by this Court." *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

The trial court determined that the alleged statement by Morrison was not credible, and the evidence supported this finding. Therefore, any error by the trial court in excluding the statement was harmless and did not result in substantial injustice.

II. Verdict Against the Great Weight of the Evidence

Defendant also argues the trial court's findings of fact mandate a conclusion that plaintiff participated in the burning of the house. We disagree. When reviewing a claim that the verdict was against the great weight of the evidence, the trial court must determine whether the overwhelming weight of the evidence favors the losing party. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 261; 617 NW2d 777 (2000). This Court must then determine whether the trial court abused its discretion in ruling with regard to a motion for a new trial. *Id*. "Substantial deference is given to the trial court's conclusion that the verdict was not against the great weight of the evidence." *Id*. A trial court's findings of fact are reviewed for clear error. *Featherston v Steinhoff*, 226 Mich App 584, 588; 575 NW2d 6 (1997). "A finding is clearly erroneous where, although evidence supports it, this Court is left with a firm conviction that the trial court made a mistake." *Id*.

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[2] US Const, Am VI.

"Arson, as a defense to an insurance company's liability under a fire insurance policy, may be proved by circumstantial evidence." *Johnson v Auto-Owners Ins Group*, 202 Mich App 525, 527; 509 NW2d 538 (1993). The insurer must demonstrate by a preponderance of the evidence that the insured plaintiff set the fire or caused it to be set. *Id*. The insurer need not prove motive or opportunity, which are but relevant factors to be considered when making the vital determination of whether the insured caused the fire to be set. *Id.* at 527-528.

In this case, the trial court determined that there was an arson committed by an amateur, that one of the plaintiff's keys was likely used in entering the house, that plaintiff sold Morrison a van for substantially less than plaintiff paid for it, and that Morrison had never paid plaintiff for the van. Further, the trial court noted that plaintiff had numerous debts, his father had passed away shortly before the fire, and that he had a new baby. However, the trial court also found that the van had been damaged before plaintiff sold it to Morrison, that plaintiff attempted to sell the van for $3,000 for a time before selling it to Morrison for $1,000, that plaintiff's income was generally sufficient to cover his debts, that plaintiff was a "low maintenance" person accustomed to living under the financial and housing circumstances in which he found himself at the time of the fire and that plaintiff had additional assets, including 80 acres of property and farm equipment in excellent condition. The trial court further found defendant's witnesses were not credible due to the "lengthy relationship" between plaintiff's family and defense witnesses, "involving the birth of children, threats, PPOs, [and non-marital] sex," and the various confrontations between the individuals involved. After thoroughly reviewing all of the evidence presented, including Morrison's admissions, we find no clear error in the trial court's factual determinations, and no abuse of discretion in the trial court's decision that the verdict was not against the great weight of the evidence.[3] The trial court, as fact-finder, was in a much better position to judge the credibility of the witnesses here. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992).

We affirm.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Donald S. Owens

[3] We note that a different trial judge heard defendant's motion for a new trial.